

**In the
Supreme Court of the United States**

PRISCILLA LEFEBURE,

Petitioner,

v.

SAMUEL D'AQUILLA, 20TH JUDICIAL DISTRICT, INDIVIDUALLY
AND IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY,

Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit**

**BRIEF OF AMICI CURIAE
LOUISIANA FOUNDATION AGAINST SEXUAL ASSAULT,
NATIONAL ALLIANCE TO END SEXUAL VIOLENCE,
AND SEXUAL TRAUMA AWARENESS AND RESPONSE
IN SUPPORT OF PETITIONER**

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<i>Ballou v. McElvain</i> , No. 20-35416, 2022 WL 891791 (9th Cir. Mar. 24, 2022).....	19
<i>Baltazor v. Holmes</i> , 162 F.3d 368 (5th Cir. 1998)	19
<i>DeShaney v. Winnebago C'ty Dep't of Soc. Servs.</i> , 489 U.S. 189 (1989)	15
<i>Eagleston v. Guido</i> , 41 F.3d 865 (2d Cir. 1994).....	16
<i>Elliot-Park v. Manglona</i> , 592 F.3d 1003 (9th Cir. 2010)	22
<i>Estate of Macias v. Ihde</i> , 219 F.3d 1018 (9th Cir. 2000)	16
<i>Fajardo v. Cty. of Los Angeles</i> , 179 F.3d 698 (9th Cir. 1999)	18
<i>Hilton v. City of Wheeling</i> , 209 F.3d 1005 (7th Cir. 2000)	16
<i>Hynson v. City of Chester Legal Dep't</i> , 864 F.2d 1026 (3d Cir. 1988).....	16
<i>J.E.B. v. Alabama ex rel. T.B.</i> , 511 U.S. 127 (1994)	21
<i>Johnson v. Holliday</i> , No. 21-30108, 2022 WL 622323 (5th Cir. Mar. 3, 2022).....	26

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<i>Jones v. Union Cty.</i> , 296 F.3d 417 (6th Cir. 2002)	16
<i>Lefebure v. Boeker</i> , No. 3:17-cv-1791-JWD-EWD (M.D. La. June 5, 2018).....	16, 17
<i>People v. Taylor</i> , No. 241310, 2003 WL 22439715 (Mich. Ct. App. Oct. 28, 2003).....	18
<i>Pyke v. Cuomo</i> , 258 F.3d 107 (2d Cir. 2001).....	18
<i>Ricketts v. City of Columbia</i> , 36 F.3d 775 (8th Cir. 1994)	16
<i>Ryan v. City of Detroit, MI</i> , 698 F. App'x 272 (6th Cir. 2017).....	24
<i>Soto v. Flores</i> , 103 F.3d 1056 (1st Cir. 1997).....	16
<i>State v. Chester</i> , 208 So.3d 338 (La. 12/16/16)	18
<i>State v. Ingram</i> , 57 So.3d 299 (La. 3/25/11)	18
<i>United States v. Calandra</i> , 414 U.S. 338 (1974)	23
<i>United States v. Virginia</i> , 518 U.S. 515 (1996)	10, 21
<i>Vill. Of Arlington Heights v. Metro Hous. Dev. Corp.</i> , 429 U.S. 252 (1977)	19
<i>Watson v. City of Kansas City</i> , 857 F.2d 690 (10th Cir. 1988)	16, 24

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---------------------------------	----

STATUTES

La. Code Crim. Proc. art. 442.....	23
La. Code Evid. art. 404(B).....	23

OTHER AUTHORITIES

AEquitas, <i>Sexual Assault Kit Initiative, Overcoming the Consent Defense: Prosecuting the Known Offender</i> (2021) https://www.sakitta.org/toolkit/docs/Overcoming-the-Consent-Defense-Prosecuting-the-Known-Offender.pdf	14
American Bar Association, <i>Criminal Justice Standards: Prosecution Function</i> (4th ed. 2017), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/	16
Andrea J. Ritchie, <i>How Some Cops Use the Badge to Commit Sex Crimes</i> , WASH. POST (Jan. 12, 2018), https://www.washingtonpost.com/outlook/ how-some-cops-use-the-badge-to-commit- sex-crimes/2018/01/11/5606fb26-eff3-11e7- b390-a36dc3fa2842_story.html	24
Anthony Gangi, <i>Yes, Corrections Officers Are Law</i>	

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<i>Enforcement Officers</i> , CORRECTIONS (Sept. 1, 2015), https://www.corrections1.com/corrections-jobs-careers/articles/yes-corrections-officers-are-law-enforcement-officers-ZZ9odttfoVCthDZv/	25
Ashley Fantz et al., <i>Destroyed: How the Trashing of Rape Kits Failed Victims and Jeopardizes Public Safety</i> , CNN (Nov. 29, 2018), https://www.cnn.com/interactive/2018/11/investigates/police-destroyed-rapekits/index.html	14
Azi Paybarah, <i>Victim's Rape Kit Was Used to Identify Her as a Suspect in Another Case</i> , N.Y. TIMES (Feb. 15, 2022), https://www.nytimes.com/2022/02/15/us/san-francisco-police-rape-kit-dna.html	8
Cato Institute., <i>National Police Misconduct Reporting Project: 2010 Annual Report</i> (2010), https://www.leg.state.nv.us/Session/77th2013/Exhibits/Assembly/JUD/AJUD338L.pdf)	24
Chris Nakamoto, <i>Investigative Unit: Sheriff's Office Admits to Mistake After Not Sending Rape Kit off for Testing</i> , WBRZ (June 26, 2017), https://www.wbrz.com/news/investigative-unit-sheriff-s-office-admits-to-mistake-after-not-sending-rape-kit-off-for-testing/	17

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Corey Rayburn Yung, <i>Rape Law Gatekeeping</i> , 58 B.C. L. REV (2017)	13
David H. Gans, “We Do Not Want to Be Hunted”: <i>The Right to Be Secure and Our Constitutional Story of Race and Policing</i> , 11 COLUM. J. RACE & L (2021).....	15
David Lisak et al., <i>False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases</i> , 16 VIOLENCE AGAINST WOMEN (2010).....	9
Emily Jones, <i>Untested and Neglected: Clarifying the Comparator Requirement in Equal Protection Claims Based on Untested Rape Kits</i> , 115 NW. U. L. REV (2021)	6, 8, 12
Emma Sleath & Ray Bull, <i>Police Perceptions of Rape Victims and the Impact on Case Decision Making: A Systematic Review</i> , 34 AGGRESSION & VIOLENT BEHAV (2017).....	9
End The Backlog, <i>Where the Backlog Exists and What’s Happening to End It</i> , http://www. endthebacklog.org/backlog/where-backlog- exists-and-whats-happening-end-it (last visited Apr. 4, 2022)	12, 13
Francine Russo, <i>Sexual Assault May Trigger Involuntary Paralysis</i> , SCI. AM. (Aug. 4, 2017), https://	

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www.scientificamerican.com/article/ sexual-assault-may-trigger-involuntary- paralysis/	21
Gaby Lion, <i>Bringing Untested Rape Kits out of Storage and into the Courtroom: Encouraging the Creation of Public- Private Partnerships to Eliminate the Rape Kit Backlog</i> , 69 HASTINGS L.J. (2018).....	9
Glenne Ellen Fucci, <i>No Law and No Order: Local, State, and Federal Government Responses to the United States Rape Kit Backlog Crisis</i> , 14 CARDOZO PUB. L. POL'Y & ETHICS J (2015)..	12, 13
Grace Toohey, <i>Expert: DA's Omission of Rape Kit in Case Against Angola Assistant Warden 'Shocking . . . Unbelievable,' ADVOCATE</i> (Mar. 14, 2017), https://www.theadvocate. com/baton_rouge/news/courts/article_ 09b2b6d2-08e2-11e7-ab3b-efd5ca6a70ef. html	6, 18, 19
Heather Huhtanen, <i>End Violence Against Women Int'l, Gender Bias in Sexual Assault Response and Investigation</i> (2020)	5
International Association of Forensic Nurses, <i>What Is Forensic Nursing</i> , INT'L ASS'N OF FORENSIC NURSES, https://forensicnurses. org/page/WhatisFN/ (last visited Apr. 4, 2022).....	12

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Jennifer Gentile Long, <i>Explaining Counterintuitive Victim Behavior in Domestic Violence and Sexual Assault Cases</i> , Am. Prosecutors Rsch. Inst., THE VOICE (2006), http://www.ncdsv.org/images/Explaining%20Counterintuitive%20victim%20behavior.pdf	20
Joanna Walters, <i>An 11-Year-Old Reported Being Raped Twice, Wound Up with a Conviction</i> , WASH. POST (Mar. 12, 2015), https://www.washingtonpost.com/lifestyle/magazine/a-seven-year-search-for-justice/2015/03/12/blcccb30-abe9-11e4-abe8-e1ef60ca26de_story	8
Joanne Archambault et al., <i>End Violence Against Women Int’l, Forensic Examinations of Sexual Assault Victims and Suspects</i> (2021), https://evawintl.org/wp-content/uploads/Module-9_Part-1-Exam-Module.pdf	12
Joe Gyan, Jr. & David J. Mitchell, <i>Earl Theriot Jr. Gets Probation, Fine for Lying to FBI</i> , ADVOCATE (July 1, 2016), https://www.theadvocate.com/baton-rouge/news/article_a40c064d-94b1-5738-acd3-14a797432521.html	25
Joe Gyan, Jr. <i>Ex-Angola Guard’s Sexual Assault of Inmate ‘Deplorable,’ Federal Appeals Court Says</i> , ADVOCATE (Mar. 9, 2022),	

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https://www.theadvocate.com/baton_rouge/news/courts/article_96315ec6-9e90-11ec-86ce-db5b497b4b2b.html	26
Karen Rich & Patrick Seffrin, <i>Police Interviews of Sexual Assault Reporters: Do Attitudes Matter?</i> , 27 VIOLENCE & VICTIMS (2012)	11
Kathleen D. Kelley & Rebecca Campbell, <i>Moving On or Dropping Out: Police Processing of Adult Sexual Assault Cases</i> , 23 WOMEN & CRIM. JUST (2013)	11
Kimberly A. Lonsway et al., <i>End Violence Against Women Int’l, Dynamics of Sexual Assault: What Does Sexual Assault Really Look Like?</i> (2020), https://evawintl.org/wp-content/uploads/Module-2_Dynamics-11.9.2020.pdf	20
Linda Fairstein, <i>Sexual Violence: Our War Against Rape</i> (1995)	5
Louisiana Commission of Law Enforcement & Admin. of Crim. Just., <i>2021 Sexual Assault Collection Kit and Sexually-Oriented Criminal Offenses Report</i> (2022), https://lclelsac.com/wp-content/uploads/2022/02/Sexual-Assault-and-Crime-Report-03-02-2022.pdf	13
Lynn Langton et al., U.S. DEP’T OF JUST., <i>Victimizations Not Reported to the Police</i> , 2006–2010 (2012),	

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https://www.bjs.gov/content/pub/pdf/vnrp0610.pdf)	6
Megan C. Kearns et al., <i>The Association Between Gender Inequality and Sexual Violence in the U.S.</i> , 58 AM. J. PREVENTATIVE MED (2020)	5
Melissa S. Morabito et al., <i>Decision Making in Sexual Assault Cases: Replication Research on Sexual Violence Case Attrition in the U.S.</i> (2019), https://www.ojp.gov/pdffiles1/nij/grants/252689.pdf	7
Morrison Torrey, <i>When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions</i> , 24 U.C. DAVIS L. REV (1991)	7
Nat'l Jud. Educ. Program, <i>Judges Tell: What I Wish I Had Known Before I Presided in an Adult Victim Sexual Assault Case</i> (2011), https://www.legalmomentum.org/sites/default/files/reports/Judges%20Tell%20Final%202017.pdf	14, 20
Patricia L. Fanflik, <i>Victim Responses to Sexual Assault: Counterintuitive or Simply Adaptive</i> , Nat'l Dist. Att'ys Ass'n (2007), https://www.nsvrc.org/publications/guides/victim-responses-sexual-assault-counterintuitive-or-simply-adaptive	7

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Philip M. Stinson et al., <i>Police Sexual Misconduct: A National Scale Study of Arrested Officers</i> (2014)	24, 25
Rachel E. Morgan & Alexandra Thompson, <i>Criminal Victimization</i> , U.S. Dep’t of Just. (2021), https://bjs.ojp.gov/sites/g/ files/xyckuh236/files/media/document/ cv20.pdf	4, 5
Rachel M. Venema, <i>Police Officers’ Rape Myth Acceptance: Examining the Role of Officer Characteristics, Estimates of False Reporting, and Social Desirability Bias</i> , 33 VIOLENCE & VICTIMS (2018)	7, 9, 11
RAINN, <i>Perpetrators of Sexual Violence: Statistics</i> , https://www.rainn.org/statistics/ perpetrators-sexual-violence (last visited Apr. 4, 2022)	20
RAINN, <i>Statistics</i> , https://www.rainn.org/statistics (last visited Apr. 4, 2022).....	4
Ryan Boldrey, <i>Rape Kit Testing Leads to Lengthy Sentence in 2013 Kalamazoo County Sex Assault</i> , MLIVE (Feb. 8, 2021), https:// www.mlive.com/news/kalamazoo/2021/02/ rape-kit-testing-leads-to-lengthy-prison- sentence-in-2013-kalamazoo-county-sex- assault.html	14

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Sarah E. Ullman & Raymond A. Knight, <i>Fighting Back: Women’s Resistance to Rape</i> , 7 J. INTERPERSONAL VIOLENCE 31 (1992)	21
Sharon B. Murphy et al., <i>Police Reporting Practices for Sexual Assault Cases in Which “The Victim Does Not Wish to Pursue Charges,”</i> 29 J. INTERPERSONAL VIOLENCE (2014)	7
Sharon G. Smith et al., <i>The National Intimate Partner and Sexual Violence Survey: 2015 Data Brief— Updated Release</i> , Ctrs. for Disease Control & Prevention, (2018), https:// www.nsvrc.org/sites/default/files/2021-04/ 2015data-brief508.pdf	4
Sofia Resnick, <i>Why Do D.C. Prosecutors Decline Cases So Frequently? Rape Survivors Seek Answers</i> , REWIRE (Mar. 11, 2016), https://rewire. news/article/2016/03/11/d-c-prosecutors- decline-cases-frequently-rape-survivors- seek-answers/	7
T. Christian Miller et al., <i>An Unbelievable Story of Rape</i> , PROPUBLICA and MARSHALL PROJECT (Dec. 16, 2015), https://www.propublica. org/article/false-rape-accusations-an- unbelievable-story	8
U.N. Dev. Programme, <i>Frequently Asked Questions—Gender</i>	

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<i>Inequality Index (GII)</i> , U.N. DEV. PROGRAMME: HUMAN DEV. REP., https://hdr.undp.org/en/faq-page/gender-inequality-index-gii#t294n2918 (last visited Apr. 4, 2022)	5
U.S. Dep’t of Just., <i>Investigation of the New Orleans Police Department</i> (2011) https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf	10, 21
U.S. Dep’t of Just., <i>Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault and Domestic Violence</i> (2015), https://www.justice.gov/opa/file/799366/download	10
U.S. Dep’t. of Just., Off. of Inspector Gen., <i>Deterring Staff Sexual Abuse of Federal Inmates</i> (2005), https://oig.justice.gov/sites/default/files/archive/special/0504/index.htm	25



IDENTIFICATION OF AMICI CURIAE¹

The LOUISIANA FOUNDATION AGAINST SEXUAL ASSAULT (LaFASA) is a coalition agency serving sexual assault crisis centers statewide through education, professional training, technical assistance, and community engagement.

The NATIONAL ALLIANCE TO END SEXUAL VIOLENCE (NAESV) educates policymakers about federal laws, legislation, and appropriations impacting the fight to end sexual violence.

SEXUAL TRAUMA AWARENESS & RESPONSE® (STAR) is a nonprofit sexual assault center with locations throughout Central and Southeast Louisiana, which provides legal services and counseling to survivors of sexual trauma.

¹ No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* and their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief. Petitioner consented to the filing, but, as set forth in the accompanying motion for leave to file this brief, Respondent objected.



INTEREST OF AMICI CURIAE

Amici LaFASA, NAESV, and STAR seek to eradicate sexual assault, as well as all forms of oppression that enable sexual violence. Until then, *amici* advocate for sexual assault survivors among policymakers, in the courts, and at crisis centers to increase victims' access to justice. From its prior work on behalf of sexual assault survivors from West Feliciana Parish—where Petitioner was raped—STAR believes that Respondent has a pattern and practice of ignoring sexual assault victims. For these reasons, *amici* have a strong interest in the outcome of this case.



SUMMARY OF THE ARGUMENT

Most sexual assault victims are women. Gender bias shapes both law enforcement's response to victims and the perception of their assault. Failure to address that bias through training and supervision stymies criminal investigations. Policies that ignore rape kits, including forensic medical examinations, squander conviction-securing evidence. These law enforcement practices, policies, and procedures create a get-out-of-jail-free environment that promotes sexual assault occurrence and re-occurrence. Because Respondent's discriminatory policies and practices created this very environment in West Feliciana Parish, Petitioner's rapist felt he could get away with sexually assaulting her, and he did. Petitioner has standing to seek redress from Respondent for the discriminatory policies and practices that deprived her of equal protection under the law, and made her rape possible.



ARGUMENT

I. SEXUAL ASSAULT—A CRIME THAT OVERWHELMINGLY VICTIMIZES WOMEN AS COMPARED TO MEN—IS UNDERREPORTED, UNDER-INVESTIGATED, AND MOSTLY UNPUNISHED.

In the United States, a sexual assault occurs every sixty-eight seconds.² Hundreds of thousands of Americans are sexually assaulted each year.³ While women are less likely to be victims of violent crime generally,⁴ women are overwhelmingly the targets of sexual assault.⁵ One in five American women experience completed or attempted rape in her lifetime (21.3% or an estimated 25.5 million women).⁶ By contrast, only 1 in 38 men (2.6% or an estimated 2.8 million men) share this devastating experience.⁷

² *Statistics*, RAINN, <https://www.rainn.org/statistics> (last visited Apr. 4, 2022).

³ See generally Rachel E. Morgan & Alexandra Thompson, U.S. Dep't of Just., *Criminal Victimization*, 2020 (2021), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/cv20.pdf>.

⁴ *Id.* at 9 tbl.6.

⁵ See Sharon G. Smith et al., Ctrs. for Disease Control & Prevention, *The National Intimate Partner and Sexual Violence Survey: 2015 Data Brief—Updated Release 1* (2018), <https://www.nsvrc.org/sites/default/files/2021-04/2015data-brief508.pdf>.

⁶ See *id.* at 1, 15 tbl.1.

⁷ See *id.* at 16 tbl.2.

While this problem is one of national significance and concern, it is more common in certain communities. States with higher gender inequality,⁸ including Louisiana, have increased rates of rape using physical force.⁹

Sexual assault perpetrators are unlikely to be held accountable by the U.S. justice system. Only 5 to 20% of sexual assaults are reported,¹⁰ making it the least reported of all violent crimes.¹¹ Fewer still are prosecuted (0.4 to 5.4%) or result in convictions (0.2 to 5.2%).¹² As one former prosecutor observed, “[i]n no other category of crime does the victim approach the criminal justice system with lower expectations of a successful resolution than in the area of sex offenses.”¹³ The consequences of this gender bias

⁸ The United Nations developed the Gender Inequality Index to show “the loss in potential human development due to disparity between female and male achievements” and “reflect[] how woman are disadvantaged” in terms of reproductive health, empowerment, and the labor market. *Frequently Asked Questions—Gender Inequality Index (GII)*, U.N. DEV. PROGRAMME: HUMAN DEV. REP., <https://hdr.undp.org/en/faq-page/gender-inequality-index-gii#t294n2918> (last visited Apr. 4, 2022).

⁹ Megan C. Kearns et al., *The Association Between Gender Inequality and Sexual Violence in the U.S.*, 58 AM. J. PREVENTATIVE MED. 12, 15 (2020).

¹⁰ Heather Huhtanen, *End Violence Against Women Int’l, Gender Bias in Sexual Assault Response and Investigation, Part 1: Implicit Gender Bias 4* (2020).

¹¹ Morgan & Thompson, *supra* note 3, at 7 tbl.4.

¹² Huhtanen, *supra* note 10, at 4.

¹³ Linda Fairstein, *Sexual Violence: Our War Against Rape* 67 (1995).

permeate every aspect of the aftermath of a sexual assault and investigation—and encourage the crime itself.

1. Gender Bias Deters Victims from Reporting Sexual Assault and Increases the Risk of Victim Attrition from the Criminal Justice System.

Petitioner reported the grand jury convened for her rape made her feel “like I was on trial, like I was the criminal.”¹⁴

Unfortunately, Petitioner’s experience is not unique. Anticipating similar skepticism and shaming, many sexual assault victims choose not to seek redress, citing police bias, or their impression that police would not believe “the crime was important enough to address,” as a basis for not coming forward.¹⁵

For those who come forward and report, encounters with law enforcement are all too often re-traumatizing

¹⁴ Grace Toohey, *Expert: DA’s Omission of Rape Kit in Case Against Angola Assistant Warden ‘Shocking . . . Unbelievable,’* ADVOCATE (Mar. 14, 2017), https://www.theadvocate.com/baton_rouge/news/courts/article_09b2b6d2-08e2-11e7-ab3b-efd5ca6a70ef.html.

¹⁵ Emily Jones, Note, *Untested and Neglected: Clarifying the Comparator Requirement in Equal Protection Claims Based on Untested Rape Kits*, 115 NW. U. L. REV. 1781, 1783 n.8 (2021) (quoting Lynn Langton et al., U.S. DEP’T OF JUST., *Victimizations Not Reported to the Police*, 2006–2010, at 4 (2012), <https://www.bjs.gov/content/pub/pdf/vnrp0610.pdf>).

experiences,¹⁶ and so “[s]ubstantial attrition is pervasive in the criminal justice system.”¹⁷

2. Pervasive Gender Bias Informs Law Enforcement Encounters with Victims.

Victims who report sexual assault face considerable scrutiny, even though no objective evidence suggests rape is falsely reported more often than any other violent crime.¹⁸ False reports are rare, accounting

¹⁶ See Rachel M. Venema, *Police Officers’ Rape Myth Acceptance: Examining the Role of Officer Characteristics, Estimates of False Reporting, and Social Desirability Bias*, 33 VIOLENCE & VICTIMS 176, 177 (2018) (noting that victims reporting sexual assault often experience secondary victimization from “[h]arsh treatment or even neutral or mixed reactions by police officers,” which “can invoke shame and other negative and sometimes long-term consequences for victims”); Patricia L. Fanflik, Nat’l Dist. Att’y’s Ass’n, *Victim Responses to Sexual Assault: Counterintuitive or Simply Adaptive* 1 (2007), <https://www.nsvrc.org/publications/guides/victim-responses-sexual-assault-counterintuitive-or-simply-adaptive>; Sofia Resnick, *Why Do D.C. Prosecutors Decline Cases So Frequently? Rape Survivors Seek Answers*, REWIRE (Mar. 11, 2016), <https://rewire.news/article/2016/03/11/d-c-prosecutors-decline-cases-frequently-rape-survivors-seek-answers/> (noting that prosecutors “seemed to disbelieve [victims’] stories or blame them for the alleged assault”).

¹⁷ Melissa S. Morabito et al., *Decision Making in Sexual Assault Cases: Replication Research on Sexual Violence Case Attrition in the U.S.*, at VI (2019), <https://www.ojp.gov/pdffiles1/nij/grants/252689.pdf>; see also Sharon B. Murphy et al., *Police Reporting Practices for Sexual Assault Cases in Which “The Victim Does Not Wish to Pursue Charges,”* 29 J. INTERPERSONAL VIOLENCE 144, 144 (2014) (finding 32.8% of sexual assault victims drop cases after making an initial report to law enforcement).

¹⁸ See Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1028 (1991).

for only 2% of reported rapes,¹⁹ yet the general public believes false reports happen ten times as often.²⁰ And police officers are more skeptical still, crediting, on average, fewer than half of all reported rapes.²¹

Disbelief is so rampant among law enforcement that it is not unheard of for sexual assault victims to themselves be convicted of false reporting when they do come forward.²² Sexual assault victims have even been treated as suspects in unrelated cases after reporting their rapes.²³

¹⁹ Jones, *supra* note 16, at 1792.

²⁰ *See id.* at 1792 n.70.

²¹ *Id.* (“[P]olice officers believe that 10%–50% are false in one study, 40%–80% in another study, and an average of 53% in a third study.”)

²² *See e.g.*, Joanna Walters, *An 11-Year-Old Reported Being Raped Twice, Wound Up with a Conviction*, WASH. POST (Mar. 12, 2015), https://www.washingtonpost.com/lifestyle/magazine/a-seven-year-search-for-justice/2015/03/12/b1cccb30-abe9-11e4-abe8-e1ef60ca26de_story (reporting that an eleven-year-old girl was orally, anally, and vaginally raped by a group of adult men over days of abduction, but the police refused to investigate and arrested her for false reporting notwithstanding evidence of bleeding, tearing in her vagina, and her status as a minor); T. Christian Miller et al., *An Unbelievable Story of Rape*, PROPUBLICA and MARSHALL PROJECT (Dec. 16, 2015), <https://www.propublica.org/article/false-rape-accusations-an-unbelievable-story>.

²³ Azi Paybarah, *Victim’s Rape Kit Was Used to Identify Her as a Suspect in Another Case*, N.Y. TIMES (Feb. 15, 2022), <https://www.nytimes.com/2022/02/15/us/san-francisco-police-rape-kit-dna.html> (reporting that the San Francisco Police Department arrested a rape victim for an unrelated property crime based on DNA samples taken from her rape investigation in its long-standing practice—believed to be common in at least California—

Why do law enforcement officers believe that more often than not women lie about sexual assault? In large part, because of unfounded beliefs as to what a sexual assault victim “should” look like and how she should act.²⁴ When sexual assault victims lack or do “not exhibit stereotypical behaviors expected by police, such as crying, expressing anger or fear, [or] immediately reporting the crime, police [are] more likely to believe the victim was making a false report.”²⁵ These stereotypes are archetypical of gender bias.²⁶

of comparing genetic material belonging to sexual assault victims with genetic material collected in open criminal cases).

²⁴ Venema, *supra* note 17, at 176 (“Police officer perceptions of sexual assault, including their endorsement of rape myths, may contribute to both a negative experience of the individual reporting to the police and also a lack of case progression.”). Rape myths are “attitudes and beliefs that are generally false but are widely and persistently held, and that serve to deny and justify male sexual aggression against women.” *See id.* at 178. Examples of rape myths include “[i]f a woman doesn’t physically resist sex—even if protesting verbally—it can’t be considered rape,” and “[a] woman who goes to the home or apartment of a man on the first date is implying that she wants to have sex.” *See id.* at 189 tbl.4.

²⁵ Gaby Lion, Note, *Bringing Untested Rape Kits out of Storage and into the Courtroom: Encouraging the Creation of Public-Private Partnerships to Eliminate the Rape Kit Backlog*, 69 HASTINGS L.J. 1009, 1019 (2018) (citing David Lisak et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 1318, 1331 (2010)); *see also* Emma Sleath & Ray Bull, *Police Perceptions of Rape Victims and the Impact on Case Decision Making: A Systematic Review*, 34 AGGRESSION & VIOLENT BEHAV. 102, 108 (2017) (“Victims who have emotional reactions during the reporting process were viewed as more credible; however, overemotional reactions were viewed as cutting against credibility, suggesting

According to the Department of Justice, gender bias “may compromise law enforcement’s ability to ascertain the facts [of a sexual assault], determine whether the incident is a crime, and develop a case that supports effective prosecution and holds the perpetrator accountable.”²⁷ Only a two-hour drive south of the Louisiana State Penitentiary at Angola—where Petitioner was raped—the Department of Justice found pervasive gender bias in the New Orleans Police Department (NOPD) for failing to “effectively and appropriately respond” to violent sexual assault crimes.²⁸ Specifically, the NOPD’s “investigations [are] seriously deficient, marked by poor victim interviewing skills, missing or inadequate documentation, and minimal efforts to contact witnesses or interrogate suspects.”²⁹ The Department of Justice uncovered documents “replete with stereotypical assumptions and judgments about sex crimes and victims of sex crimes, including misguided commentary about the victims’

that the rape claim was false.”).

26 *See United States v. Virginia*, 518 U.S. 515, 550 (1996) (denouncing the use of “generalizations about ‘the way women are’” as bases for denying women equal protection and opportunities under the law).

27 U.S. Dep’t of Just., *Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault and Domestic Violence* 3 (2015), <https://www.justice.gov/opa/file/799366/download>.

28 U.S. Dep’t of Just., *Investigation of the New Orleans Police Department* 43 (2011) [hereinafter INVESTIGATION OF NOPD], https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf.

29 *Id.*

perceived credibility, sexual history, or delay in contacting the police.”³⁰

Educating and training prosecutors, and other members of law enforcement, can make a key difference in combatting these entrenched biases, in turn providing a sexual assault victim with a better opportunity to achieve justice against her perpetrator. Law enforcement officers who undergo sexual assault training demonstrate significantly better victim interviewing skills.³¹ Victims are less likely to withdraw from the criminal justice system when law enforcement invest even “moderate” levels of investigative effort, like collecting scene evidence, interviewing witnesses and suspects, and consulting with experts.³²

3. Rape Kits—Including Forensic Medical Exams—Are Critical Tools in the Prosecution of Sexual Assault, but Are Chronically Underutilized.

The best resource for law enforcement to bolster (or at least assess) a victim’s credibility is a rape kit, which includes a forensic medical exam (FME). Typically, an FME is performed by a specially trained healthcare provider, who interviews the victim about the assault, and then conducts a physical examination including “a vaginal exam, photos of injuries, and

³⁰ *Id.*

³¹ See Venema, *supra* note 17, at 181 (citing Karen Rich & Patrick Seffrin, *Police Interviews of Sexual Assault Reporters: Do Attitudes Matter?*, 27 VIOLENCE & VICTIMS 263 (2012)).

³² See Kathleen D. Kelley & Rebecca Campbell, *Moving On or Dropping Out: Police Processing of Adult Sexual Assault Cases*, 23 WOMEN & CRIM. JUST. 1, 1 (2013).

samples of hair fibers, blood, semen, and saliva.”³³ In some jurisdictions, the collected DNA is then matched to DNA obtained from a convicted offender or, if it exists, DNA from arrested suspects; if there is no match, the DNA will remain in the system should it match with a future assailant.³⁴

Sexual assault cases are twice as likely to be prosecuted if the victim had an FME, and FMEs have also been shown to increase conviction rates and average sentences.³⁵ But for FMEs to benefit prosecutions, the prosecutor must actually review this evidence.

Notwithstanding their utility in both prosecuting and preventing crime, “hundreds of thousands of untested kits have been found in cities across the country.”³⁶ “[T]hese numbers fail to tell the whole story because only some of the largest cities in the nation have been put under public and governmental

³³ Jones, *supra* note 16, at 1787–88; *see also* *What Is Forensic Nursing*, INT’L ASS’N OF FORENSIC NURSES, <https://forensicnurses.org/page/WhatisFN/> (last visited Apr. 4, 2022).

³⁴ *See* Glenne Ellen Fucci, Note, *No Law and No Order: Local, State, and Federal Government Responses to the United States Rape Kit Backlog Crisis*, 14 CARDOZO PUB. L. POL’Y & ETHICS J. 193, 196 (2015).

³⁵ Joanne Archambault et al., *End Violence Against Women Int’l, Forensic Examinations of Sexual Assault Victims and Suspects, Part 1: Types and Purposes of Evidence* 17 (2021), https://evawintl.org/wp-content/uploads/Module-9_Part-1-Exam-Module.pdf.

³⁶ *Where the Backlog Exists and What’s Happening to End It*, End the Backlog, <http://www.endthebacklog.org/backlog/where-backlog-exists-and-whats-happening-end-it> (last visited Apr. 4, 2022).

scrutiny to eliminate their backlogs. These statistics fail to explain how many small cities, cities with limited resources, counties in rural areas and towns with a small police force also have handled their backlogged kits.”³⁷

While New Orleans has been awarded millions in federal funding to end its backlog,³⁸ and successfully eliminated it,³⁹ rural Louisiana parishes like the one where Petitioner was raped account for the state’s current backlog of hundreds of rape kits.⁴⁰

Law enforcement has total discretion in most states, including Louisiana, on whether to test rape kits.⁴¹ Petitioner’s rape kit was not tested, apparently because the accused claimed their encounter was consensual. But failing to test rape kits in cases involving the defense of consent prevents law enforcement from connecting a perpetrator with past and future assaults.⁴² A prosecutor who does not

³⁷ Fucci, *supra* note 35, at 200.

³⁸ *Where the Backlog Exists and What’s Happening to End It: Louisiana*, END THE BACKLOG, <https://www.endthebacklog.org/Louisiana> (last visited Apr. 4, 2022).

³⁹ La. Comm’n on L. Enft & Admin. of Crim. Just., *2021 Sexual Assault Collection Kit and Sexually-Oriented Criminal Offenses Report* 8 tbl.1 (2022), <https://lclelsac.com/wp-content/uploads/2022/02/Sexual-Assault-and-Crime-Report-03-02-2022.pdf>.

⁴⁰ *Id.* at 30–31 tbl.7.

⁴¹ Corey Rayburn Yung, *Rape Law Gatekeeping*, 58 B.C. L. REV. 205, 207 (2017) (noting that only five states require testing rape kits).

⁴² AEquitas, *Sexual Assault Kit Initiative, Overcoming the Consent Defense: Prosecuting the Known Offender* 1 (2021) <https://www.sakitta.org/toolkit/docs/Overcoming-the-Consent->

present rape kit evidence may also inadvertently bolster the defense’s theory that the rape was consensual, because “[t]hanks to the ‘CSI’ effect, jurors expect DNA evidence even in cases where the victim and defendant were closely acquainted or married.”⁴³

The evidence of the criminal justice system’s complete and systematic failure to adequately enforce laws against sexual assault is glaring. Because most victims of sexual violence are women, women feel this failure most acutely. And indeed, much of this failure is rooted in long-disproven stereotypes about women and (un)conscious gender bias. Thus, as a matter of a fact, women—including Petitioner—face unequal suffering due to the criminal justice system’s failure to implement and enforce these criminal laws. As discussed below, this fact of disparate treatment

Defense-Prosecuting-the-Known-Offender.pdf; Ashley Fantz et al., *Destroyed: How the Trashing of Rape Kits Failed Victims and Jeopardizes Public Safety*, CNN (Nov. 29, 2018), <https://www.cnn.com/interactive/2018/11/investigates/police-destroyed-rapekits/index.html> (reporting that the testing of 10,000 backlogged rape kits in Wayne County, Michigan identified 833 suspects associated with more than one assault, including several cases where one encounter was purportedly consensual); Ryan Boldrey, *Rape Kit Testing Leads to Lengthy Sentence in 2013 Kalamazoo County Sex Assault*, MLIVE (Feb. 8, 2021), <https://www.mlive.com/news/kalamazoo/2021/02/rape-kit-testing-leads-to-lengthy-prison-sentence-in-2013-kalamazoo-county-sex-assault.html> (reporting that testing a rape kit collected from a purportedly consensual encounter revealed the identity of a child rapist).

⁴³ Nat’l Jud. Educ. Program, *Judges Tell: What I Wish I Had Known Before I Presided in an Adult Victim Sexual Assault Case 15* (2011), <https://www.legalmomentum.org/sites/default/files/reports/Judges%20Tell%20Final%202017.pdf>.

results in a redressable injury under Equal Protection Clause case law.

II. GENDER BIASED LAW ENFORCEMENT DEPRIVES WOMEN—AND PETITIONER SPECIFICALLY—OF EQUAL PROTECTION UNDER THE LAW.

The Fourteenth Amendment provides that no state shall “make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,” “deprive any person of life, liberty, or property, without due process of law,” or “deny to any person within its jurisdiction the equal protection of the laws.”⁴⁴ This amendment “embodied the simple, yet radical, notion that ‘the law which operates upon one man shall operate *equally* upon all.’”⁴⁵ Flowing from this notion, the Equal Protection Clause prohibits government actors from “selectively deny[ing] its protective services to certain disfavored minorities.”⁴⁶

When evaluating an equal protection claim based on the under-enforcement of a crime that disproportionately affects women, courts consider whether: (1) there is a policy, custom, or practice providing less protection to victims of those crimes compared to other violent crimes; (2) gender discrimination was a moti-

⁴⁴ U.S. Const. amend. XIV § 1.

⁴⁵ David H. Gans, “*We Do Not Want to Be Hunted*”: *The Right to Be Secure and Our Constitutional Story of Race and Policing*, 11 COLUM. J. RACE & L. 239, 270 (2021) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866)).

⁴⁶ *DeShaney v. Winnebago C’ty Dep’t of Soc. Servs.*, 489 U.S. 189, 197 n.3 (1989).

vating factor in providing less protection; and (3) the policy, custom, or practice caused plaintiff's injury.⁴⁷

1. Respondent's Gender-Biased Practices and Policies Fail Sexual Assault Victims.

Respondent's practices and customs related to sexual assault investigations show bias against women, and discovery would likely reveal even more the disparity between his practices towards these as opposed to other investigations. For example, Respondent apparently has a practice and custom of not meeting with sexual assault victims or preparing them to testify before grand juries. In Petitioner's case, Respondent inexplicably felt too "uncomfortable" to speak with Petitioner before the grand jury proceeding, nor did anyone else from his office.⁴⁸ This practice deviates from professional standards.⁴⁹

⁴⁷ See *Soto v. Flores*, 103 F.3d 1056, 1066 (1st Cir. 1997); *Eagleston v. Guido*, 41 F.3d 865, 878 (2d Cir. 1994); *Hynson v. City of Chester Legal Dep't*, 864 F.2d 1026, 1030–31 (3d Cir. 1988); *Jones v. Union Cty.*, 296 F.3d 417, 426–27 (6th Cir. 2002); *Hilton v. City of Wheeling*, 209 F.3d 1005, 1007 (7th Cir. 2000); *Ricketts v. City of Columbia*, 36 F.3d 775, 780 (8th Cir. 1994); *Estate of Macias v. Ihde*, 219 F.3d 1018, 1028 (9th Cir. 2000); *Watson v. City of Kansas City*, 857 F.2d 690, 695–96 (10th Cir. 1988).

⁴⁸ First Amended Complaint and Jury Demand ¶ 11, *Lefebure v. Boeker*, No. 3:17-cv-1791-JWD-EWD (M.D. La. June 5, 2018) [hereinafter "Complaint"].

⁴⁹ See Am. Bar Ass'n, *Criminal Justice Standards: Prosecution Function* § 3-3.4(c) (4th ed. 2017), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/ (providing that the prosecutor should seek to interview all witnesses, including victims).

Respondent's failure to present the rape kit and forensic medical examination evidence (or even to review them) also contributed to the failure to hold Petitioner's rapist accountable.⁵⁰ Respondent "does not have a policy requiring rape kits and sexual assault examinations to be picked up and reviewed or sent to the state crime lab for testing."⁵¹ Petitioner's rape kit—containing the forensic medical examination's images of her naked body and her genetic material—sat for months at the West Feliciana Parish Sheriff's office. It was not turned over to the State Police Crime Lab until months after both the rape and the grand jury proceeding.⁵²

Petitioner's rape kit was administered seven days after the first assault and five days after the second, but nonetheless revealed evidence of "bruising in the pattern of fingers and handprints and a red, irritated cervix."⁵³ "The bruising appeared all over [Petitioner's] body—on her inner and upper thigh, her right arm, and her left shin."⁵⁴ Once informed of the rape kit's contents, Respondent reported that he "doubted evidence in the kit would support [Petitioner's] contention

⁵⁰ See *supra* section I.3.

⁵¹ Complaint ¶ 22.

⁵² Chris Nakamoto, *Investigative Unit: Sheriff's Office Admits to Mistake After Not Sending Rape Kit off for Testing*, WBRZ (June 26, 2017), <https://www.wbrz.com/news/investigative-unit-sheriff-s-office-admits-to-mistake-after-not-sending-rape-kit-off-for-testing/>

⁵³ Petition for Writ of Certiorari at 2, *Lefebure v. D'Aquilla*, No. 21-1231 (Mar. 4, 2022) [hereinafter "Petition for Writ of Certiorari"].

⁵⁴ *Id.*

that she was attacked” because, in his words, “[e]ven if you have a ton of bruises, that doesn’t say it’s not consensual.”⁵⁵ Although Respondent seems entrenched in that view, jurors may have concluded an encounter leaving someone with “a ton of bruises” was non-consensual.⁵⁶

Given what is already known about Respondent’s practices in sexual assault cases, Petitioner should be permitted to conduct discovery and determine information such as how often Respondent neglects to interview the victim of an armed robbery or attempted homicide, how often he ignores one of only two witnesses to a murder, or how often he fails to review key evidence in other cases, as compared to his treatment of sexual assault investigations like Petitioner’s.⁵⁷

⁵⁵ Toohey, *supra* note 14 (emphasis added).

⁵⁶ See *State v. Chester*, 2015-2304, p. 18 n.8 (La. 12/16/16), 208 So.3d 338, 350 n.8 (noting that a juror’s personal knowledge “is precisely the sort of information upon which jurors are called to draw in making findings of fact.”); *State v. Ingram*, 2010-2274, p. 8 (La. 3/25/11), 57 So.3d 299, 303 (“[A] juror will employ his own ordinary experience in the deliberation. . . .”); *People v. Taylor*, No. 241310, 2003 WL 22439715, at *2 (Mich. Ct. App. Oct. 28, 2003) (“[W]e believe that jurors could reasonably and properly determine on the basis of general knowledge and common life experience that such extensive bruising was unlikely to result from consensual sexual activity.”).

⁵⁷ Litigants making equal protection claims are afforded the opportunity for discovery as to the existence of a discriminatory motivation behind the denial of equal protection. See e.g. *Pyke v. Cuomo*, 258 F.3d 107, 110 (2d Cir. 2001); see also *Fajardo v. Cty. of Los Angeles*, 179 F.3d 698, 701 (9th Cir. 1999) (reversing district court’s grant of judgment on the pleadings because plaintiff sued defendants “for allegedly giving lower priority to

2. Respondent's Practices and Statements Reveal His Discriminatory Intent.

To establish discriminatory intent in an equal protection claim, a plaintiff may use direct or circumstantial evidence,⁵⁸ and intent can be inferred from law enforcement's statements and actions during an investigation.⁵⁹ The plaintiff need not show that law enforcement's discriminatory intent was the only motivation for the policy, custom, or practice.⁶⁰

Respondent's statements to the press reveal gender-based stereotypes and biases compromised his investigation and presentation of Petitioner's rape to the grand jury.

This is demonstrable in Respondent's perception of Petitioner and the account of her rape. Respondent reported to the media that he "found it troubling" that Petitioner "returned to the house where she said she was first raped."⁶¹ Petitioner was raped by her

domestic-violence 9-1-1 calls than to non-domestic-violence 9-1-1 calls" and "there are disputed issues of material fact on the question whether Defendants had such a policy").

⁵⁸ *Ballou v. McElvain*, No. 20-35416, 2022 WL 891791, at *7 (9th Cir. Mar. 24, 2022); *Baltazor v. Holmes*, 162 F.3d 368, 376 (5th Cir. 1998).

⁵⁹ See, e.g., *Balistreri v. Pacifica Police Dep't.*, 901 F.2d 696, 701 (9th Cir. 1990) (finding that the complaint stated an equal protection claim where the officer allegedly told domestic violence victim "that he did not blame plaintiff's husband for hitting her because she was 'carrying on,'" suggesting discriminatory intent towards abused women).

⁶⁰ See *Vill. Of Arlington Heights v. Metro Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977).

⁶¹ Toohey, *supra* note 14.

cousin's husband, making her among the majority of sexual violence survivors who report the offender was someone they knew.⁶² Contrary to Respondent's subjective expectation of how a rape victim would act, "in nonstranger cases post-assault contact between the victim and offender is not unusual."⁶³ Victims engage in post-assault contact as a way of normalizing or processing the assault, or to avoid disrupting their social circles or families, particularly where victims depend on those networks for emotional or financial support.⁶⁴ Petitioner was raped while she was temporarily homeless, relying on her cousin (married to her rapist) for shelter.⁶⁵ Petitioner's return to that home days after her first rape, is not "troubling," but typical of non-stranger rape victims.

Respondent was also "troubled" that "no one heard [the Petitioner] scream," ignorant of the fact that victims of assault often do not scream,⁶⁶ whether

⁶² See *Perpetrators of Sexual Violence: Statistics*, RAINN, <https://www.rainn.org/statistics/perpetrators-sexual-violence> (last visited Apr. 4, 2022).

⁶³ NAT'L JUD. EDUC. PROGRAM, *supra* note 44, at 8.

⁶⁴ See *id.* at 2; see also Jennifer Gentile Long, *Explaining Counterintuitive Victim Behavior in Domestic Violence and Sexual Assault Cases*, Am. Prosecutors Rsch. Inst., THE VOICE (2006), <http://www.ncdsv.org/images/Explaining%20Counterintuitive%20victim%20behavior.pdf>; Kimberly A. Lonsway et al., *End Violence Against Women Int'l, Dynamics of Sexual Assault: What Does Sexual Assault Really Look Like?* 40 (2020), https://evawintl.org/wp-content/uploads/Module-2_Dynamics-11.9.2020.pdf.

⁶⁵ See Petition for Writ of Certiorari at 2.

⁶⁶ See Sarah E. Ullman & Raymond A. Knight, *Fighting Back: Women's Resistance to Rape*, 7 J. INTERPERSONAL VIOLENCE 31

out of fear for their lives or as an automatic and instinctive response to trauma.⁶⁷

Ultimately, Respondent’s “troubles” evoke the “misguided commentary about the victims’ perceived credibility” that the DOJ found pervasive in the NOPD.⁶⁸ As the statistics and commentary presented above demonstrate happens so often, Respondent credited gender bias and stereotypes over Petitioner’s account of her violent rapes, and instead of trying to bolster this victim’s credibility, actively sought to undermine it before the grand jury. For example, Respondent made handwritten notes on the police report “highlight[ing] *only possible discrepancies in [Petitioner’s] description of the events*” and *presented that report to the grand jury*.⁶⁹ “His handwritten notes cast only doubt on [Petitioner], with ‘drinking’ written out and heavily underlined,” although that phrase was not in the police report itself, and only

(1992) (reporting only 22% of rape victims recall fighting and screaming during the assault).

⁶⁷ Francine Russo, *Sexual Assault May Trigger Involuntary Paralysis*, SCI. AM. (Aug. 4, 2017), <https://www.scientificamerican.com/article/sexual-assault-may-trigger-involuntary-paralysis/> (reporting that the majority of female rape survivors describe experiencing assault in a state of tonic immobility, unable to speak).

⁶⁸ INVESTIGATION OF NOPD, *supra* note 29, at 43; *see also United States. v. Virginia*, 518 U.S. 515, 541 (1996) (noting that “equal protection principles, as applied to gender classifications, mean state actors may not rely on ‘overbroad’ generalizations to make ‘judgments about people that are likely to . . . perpetuate historical patterns of discrimination’” (*quoting J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139 (1994))).

⁶⁹ Complaint ¶ 10.

Petitioner's rapist was allegedly drinking at the time of either assault.⁷⁰

Respondent's discriminatory intent against women is evident here from both his failures to act (reviewing and presenting rape kit evidence, including evidence of her forensic medical examination), his actions (discrediting Petitioner before the grand jury), and because female sexual assault victims make him "uncomfortable," "troubling" him with behavior that does not conform to his own expectations (formed from his wholesale acceptance of gender-biased stereotypes).⁷¹

3. Gender-Biased Law Enforcement Made Petitioner's Rape Possible.

Finally, it is apparent that Respondent's practice and custom toward sexual assault investigations contributed to causing Petitioner's injury. When law enforcement fails to punish "people who commit crimes against a particular [disfavored] group, it's safe to assume that crimes against that group will rise. Would-be criminals will act with greater impunity if they believe they have a get-out-of-jail-free card if they commit crimes against the disfavored group."⁷² Respondent's gender-biased practices—not testing rape kits, not reviewing forensic medical examination evidence, and seeing sexual assault victims only through the lens of unfounded stereotypes—created an environment in which Petitioner's rapist, Barrett

⁷⁰ *Id.*

⁷¹ *See, e.g., supra* note 60.

⁷² *Elliot-Park v. Manglona*, 592 F.3d 1003, 1007 (9th Cir. 2010).

Boeker, knew he would not be held accountable for raping Petitioner before he ever raped her.

Of course, the odds were with him because our justice system fails to punish sexual assault perpetrators in most cases.⁷³ And Mr. Boeker had raped before without consequences,⁷⁴ which Respondent kept from the grand jury convened for Petitioner's rape.⁷⁵

Not only was Mr. Boeker emboldened by law enforcement's prior failures to hold him accountable, Mr. Boeker, then a high-ranking warden at the Louisiana State Penitentiary at Angola, was among their ranks—protected by the “close-knit fraternity” of officers in the rural parishes around Angola.⁷⁶ Case law is replete with perpetrators within similar cohorts facing little or belated reprisal from their law

⁷³ See *supra* notes 10–12.

⁷⁴ See Complaint ¶ 71. Boeker's then wife, an Assistant Warden at Angola, reported that she “knew this was going to happen” and “was not surprised it happened” because Mr. Boeker “had also raped her sister six years ago and another girl at a party a few years back” without consequence. See *id.* ¶¶ 70–73.

⁷⁵ “Traditionally, the grand jury has been accorded wide latitude to inquire into violations of criminal law[,] . . . and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials.” *United States v. Calandra*, 414 U.S. 338, 343 (1974); see also La. Code Crim. Proc. art. 442 (providing that a grand jury indictment may not be quashed if founded on illegal evidence). Moreover, had this matter proceeded to trial, prior acts may not be admissible to establish Mr. Boeker's bad character, but may show his motive, intent, preparation, plan knowledge, or absence of mistake. See La. Code Evid. art. 404(B).

⁷⁶ Petition for Writ of Certiorari at 4.

enforcement brethren for violence against women.⁷⁷ Mr. Boeker's confidence was not misplaced.

"[S]exual misconduct is the second-most-frequently reported form of police misconduct, after excessive force," and indeed a police officer is reported for sexual misconduct at least every five days.⁷⁸ While the number of sexual assaults committed by law enforcement officers is unknown, a study of 548 arrests of police officers in 2005–2007 found that over 99% of the perpetrator-officers were male, and 92% of the victims female.⁷⁹ And while members of law enforcement commit other violent crimes at similar rates as the general population, they are more likely than the general public to commit sexual assaults.⁸⁰

When they do, repercussions are shockingly muted. Law enforcement in rural areas—like West Feliciana Parish where Petitioner was raped—are less likely to face reprisal for sexual assaults that they themselves

⁷⁷ See e.g., *Watson*, 857 F.2d at 692; *Ryan v. City of Detroit, MI*, 698 F. App'x 272, 274 (6th Cir. 2017).

⁷⁸ Andrea J. Ritchie, *How Some Cops Use the Badge to Commit Sex Crimes*, WASH. POST (Jan. 12, 2018), https://www.washingtonpost.com/outlook/how-some-cops-use-the-badge-to-commit-sex-crimes/2018/01/11/5606fb26-eff3-11e7-b390-a36dc3fa2842_story.html (citing Cato Inst., *National Police Misconduct Reporting Project: 2010 Annual Report* (2010), <https://www.leg.state.nv.us/Session/77th2013/Exhibits/Assembly/JUD/AJUD338L.pdf>).

⁷⁹ Philip M. Stinson et al., *Police Sexual Misconduct: A National Scale Study of Arrested Officers* 14, 16 (2014).

⁸⁰ CATO INST., NATIONAL POLICE MISCONDUCT REPORTING PROJECT: 2010 ANNUAL REPORT 3 (2010), <https://www.leg.state.nv.us/Session/77th2013/Exhibits/Assembly/JUD/AJUD338L.pdf>.

commit.⁸¹ Less than a hundred miles away from the Louisiana State Penitentiary—where Petitioner was raped—a police chief served no jail time after admitting “that as police chief, he took a drunk woman to his office and forced her to perform sexual acts. He then admitted to lying about that to federal investigators.”⁸²

Correctional officials are considered “part of the united blue family” along with members of law enforcement.⁸³ That some correctional officers also engage in sexual violence is another known unknown: it happens, but no one knows how often.⁸⁴ A

⁸¹ Stinson et al., *supra* note 82, at 22 (“The simple odds of a police officer losing his or her job subsequent to an arrest for a sex-related crime go down by 19.5% for every one unit increase in rurality (on the U.S. Department of Agriculture’s nine-point urban to rural scale) for the county where the officer works, controlling for all other independent variables in the model. That means that officers who work in metropolitan counties are more likely to lose their jobs following an arrest for sex related crime than officers who work in nonmetropolitan counties.”).

⁸² Joe Gyan, Jr. & David J. Mitchell, *Earl Theriot Jr. Gets Probation, Fine for Lying to FBI*, ADVOCATE (July 1, 2016), https://www.theadvocate.com/baton_rouge/news/article_a40c064d-94b1-5738-acd3-14a797432521.html.

⁸³ See Anthony Gangi, *Yes, Corrections Officers Are Law Enforcement Officers*, CORRECTIONS 1 (Sept. 1, 2015), <https://www.corrections1.com/corrections-jobs-careers/articles/yes-corrections-officers-are-law-enforcement-officers-ZZ9odttfoVCthDZv/>.

⁸⁴ U.S. Dep’t of Just., Off. of Inspector Gen., *Deterring Staff Sexual Abuse of Federal Inmates* (2005), <https://oig.justice.gov/sites/default/files/archive/special/0504/index.htm> (“Cases involving staff sexual abuse of BOP [Bureau of Prison] inmates annually comprise approximately 12% of the OIG [Office of Inspector General’s] total number of investigations.”).

corrections officer at the Louisiana State Penitentiary—where Petitioner’s rapist worked in a management role—repeatedly raped a prisoner even after the assaults were reported to prison officials.⁸⁵

Respondent’s discriminatory policies and practices caused Petitioner to suffer violent rapes because her rapist anticipated he would get away with it. And he was right.

Petitioner, therefore, has standing to seek redress from Respondent for her denial of equal protection under the law.



CONCLUSION

For all the foregoing reasons, *amici* Louisiana Foundation Against Sexual Assault, the National Alliance to End Sexual Violence, and Sexual Trauma Awareness and Response urge the Court to grant certiorari.

⁸⁵ *Johnson v. Holliday*, No. 21-30108, 2022 WL 622323, at *2 (5th Cir. Mar. 3, 2022); see also Joe Gyan, Jr. *Ex-Angola Guard’s Sexual Assault of Inmate ‘Deplorable,’ Federal Appeals Court Says*, ADVOCATE (Mar. 9, 2022), https://www.theadvocate.com/baton_rouge/news/courts/article_96315ec6-9e90-11ec-86ce-db5b497b4b2b.html (reporting that the victim was raped after reporting prior assaults).

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